RECORD AND BRIEFS

FILED
SEP - 7 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP LTD AND JACK PHILLIPS,
PETITIONERS,

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG,
AND DAVID MULLINS

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI* COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES (CCCU) AND NINE INDIVIDUAL RELIGIOUS COLLEGES AND UNIVERSITIES IN SUPPORT OF NEITHER PARTY

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress

QUESTION PRESENTED

This brief addresses the following question, which is central to the flaws in the decision below:

Does strict scrutiny apply to laws that coerce action or speech contrary to religious belief?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF AMICI 1

STATEMENT 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Religious colleges and universities, which benefit American society in countless ways, would suffer serious harm under the misinterpretations of First Amendment doctrine illustrated by the decision below. 7

A. Religious colleges and universities bring unique benefits to higher education. 7

B. Like other recent misinterpretations of Smith, the decision below would allow governments to coerce religious colleges to act contrary to their religious beliefs. 17

C. Like other recent misinterpretations of this Court's free speech precedents, the decision below would allow governments to coerce religious colleges to speak contrary to their religious beliefs. 22

II. To avoid these harms to religious liberty, this Court should hold that the First Amendment does not permit governments to coerce violations of religious belief without satisfying strict scrutiny. 24

A. This Court's free speech decisions do not relieve a government of strict scrutiny when it coerces expression in violation of religious conscience. 24

B. Whether or not Smith was correct, it does not relieve a government of strict scrutiny when it coerces action in violation of religious conscience. 27

CONCLUSION 35

APPENDIX: Interests of Particular Amici 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Agency for Int'l Development v. *Alliance for Open Society*,
133 S. Ct. 2321 (2013) 22

Burwell v. *Hobby Lobby Stores, Inc.*,
134 S. Ct. 2751 (2014) 18

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 27

Davis v. *Michigan Dept. of Treasury*,
489 U.S. 803 (1989) 33

District of Columbia v. *Heller*,
554 U.S. 570 (2008) 30

Elane Photography LLC v. *Willock*,
309 P.3d 53 (N.M. 2013) 17, 22

Employment Division v. *Smith*,
494 U.S. 892 (1990) ..... *passim*

Gay Rights Coal. of Georgetown Univ. Law Ctr. v. *Georgetown Univ.*,
536 A.2d 1 (D.C. 1987) 18

Gifford v. McCarthy,
23 N.Y.S.3d 422 (N.Y. App. Div. 2016) 17

Grutter v. *Bollinger*,
539 U.S. 306 (2003) 15

Hosanna-Tabor Evangelical Lutheran Church & School v. *EEOC*,
565 U.S. 171 (2012) 29, 30, 33

Hurley v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*,
515 U.S. 557 (1995) 27

Knox v. *Serv. Emps. Int'l Union, Local 1000*,
567 U.S. 298 (2012) 24

Lee v. *Weisman*,
505 U.S. 577 (1992) 29, 30, 33

Lyng v. *Nw. Indian Cemetery Protective Ass'n*,
485 U.S. 439 (1988) 28

Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. *Tornillo*,
418 U.S. 241 (1974) 33

Nat'l Inst. of Family & Life Advocates v. *Harris*,
839 F.3d 823 (9th Cir. 2016) 17

North Coast Women's Care Med. Grp., Inc. v. *San Diego Cty. Superior Court*,
189 P.3d 959 (Cal. 2008) 17

Obergefell v. *Hodges*,
135 S.Ct. 2584 (2015) 25, 26, 34

Richardson v. *Northwestern Christian Univ.*,
___ F. Supp. 3d ___,
2017 WL 1042465 (D. Or. Mar. 16, 2017) 18, 25

Rumsfeld v. *FAIR*,
547 U.S. 47 (2006) 21

Spence v. *State of Washington*,
418 U.S. 405 (1974) 25

State v. *Arlene's Flowers, Inc.*,
389 P.3d 543 (Wash. 2017) 17, 22

Texas v. *Johnson*,
491 U.S. 397 (1989) 24, 25

Trinity Lutheran Church of Columbia, Inc. v. *Comer*, 137 S. Ct. 2012 (2017) 28, 29

W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 27

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 28, 29, 30

Wooley v. *Maynard*, 430 U.S. 705 (1977) 24, 27

Statutes

10 U.S.C. 983 21

154 Cong. Rec. H7658-03 (2008) 5

1757 Laws of the Colony of New York 178 [Ch. 1042] 30

1770 Laws of North Carolina 787–788 (Dec. 5, 1770) 30

1792 Conn. Pub. Acts 429 (Oct. 11, 1792) 30

20 U.S.C. 1011a 5, 14

20 U.S.C. 1099 15

20 U.S.C. 1681 21

5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (enacted Mar. 29, 1757) 30

50 U.S.C. 3806 31

California A.B. 569 (2017) 17

City of St. Louis Ordinance 70459 (2017) 18

Fugitive Slave Act, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850) 32

Mass. Laws 1763, Ch. 294 30

Minutes of the Provincial Congress and the Council of Safety in State of New Jersey (Oct. 28, 1775) 30

Court Documents

Complaint,
American Civil Liberties Union v. *Washington Metropolitan Area Transit Authority*,
No. 1:17-cv-01598, dkt. no. 1
(D. D.C. Aug. 9, 2017) 33

Oral Argument Transcript,
Zubik v. *Burwell*,
136 S.Ct. 1557, No. 14-1418 (2014) 26

Scholarly Materials and Other Authorities

Adventures,
Passport: 1 to 3 Month College-Age Mission Trips 12

Association of American Colleges,
A National Policy for Private Higher Education
(1974) 9

Baylor University,
Mission Statement 13

Baylor University,
Policy on Sexual Conduct 19

Black's Law Dictionary (10th Ed. 2014) 32

Brandeis University,
Our Jewish Roots 13

Brigham Young University,
Church Educational System Honor Code 19

Brigham Young University,
Honor Code Statement 10

Brigham Young University,
Mission Deferments 12

Catechism of the Catholic Church, art. 1022 13

Chafee, Zechariah,
Government and Mass Communications (1947) ... 33

Chaput, Charles J.,
The Great Charter at 800: Why it Still Matters,
First Things (Jan. 23, 2015) 16

Conscience in America: A Documentary History of
Conscientious Objection in America, 1757–1967
(1968) 30

Crowdpac.com,
Brandeis University 8

Crowdpac.com,
Candidates 8

Crowdpac.com,
How liberal or conservative is your university? 8

Deuteronomy 10:18–19 13

EDSmart,
*College Sexual Assault Statistics of Top Ranked
Schools 2015* 10

Exodus 22:21 14

Global Volunteers,
International Student Volunteers 12

Gobry, Pascal-Emmanuel,
*How academia's liberal bias is killing social
science*, The Week (Dec. 17, 2014) 8

Harrison, Amy,
*BYU students fight global issue of human
trafficking*, The Daily Universe (Jan. 15, 2013) ... 16

Heise, Megan,
Tips for College Students Before, During, and After

Volunteering Abroad, Go Overseas (July 16, 2013) 12

Isaiah 42:6 15

Jackson, Ruby West & McDonald, William T., Finding Freedom: The Untold Story of Joshua Glover, Runaway Slave (2007) 32

Jones, Rufus M., The Quakers in the American Colonies (1962) 31

Kuchler, Bonnie Louise, *One Heart: Universal Wisdom from the World's Scriptures* (2003) 15

La Sierra University, *Student Missions* 12

Liberty University, *Mission Statement* 13

Loudenback, Tanya, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016) 10

Luke 13:20–21 15

Luther College, *Mission Statement* 13

Madison, James, Presidential Pardon, November 20, 1816 31

Matthew 13:33 15

Matthew 25:35–40 14

Matthew 5:14–15 15

McConnell, Michael, *Establishment and Disestablishment at the Founding, Part I: The Establishment of Religion*, 44 Wm. & M. L. Rev. 2105 (2003) 30

Middleton, Stephen,
The Black Laws: Race and the Legal Process in Early Ohio (2005) 32

Niche,
Safest College Campuses 10

Oaks, Dallin H.,
A Private University Looks at Government Regulation,
4 J. Coll. & Univ. L. 1 (1976) 20

Office of Campus Ministries, Andrews University
Missions 12

Orphan Outreach,
Short-Term Mission Trips 12

Paige, R. Michael et al.,
Study Aboard for Global Engagement: The Long Term Impact of Mobility Experiences,
20 Intercultural Education 529 (2009) 12

Pepperdine University,
Mission, Vision, and Affirmation Statement 12

Pepperdine University,
Student Code of Conduct 19

Pérez-Peña, Richard,
Muslims From Abroad Are Thriving in Catholic Colleges, N.Y. Times (Sep. 2, 2012) 11

Phillips, James,
Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Explanation of Three Hypothesis, 39 Harv. J. L. Pub. Pol. 153 (2016) 8

Princeton Review, The,
The Gap Year Experience: A Life-Changing Opportunity 12

Privileged Communications to Clergymen,
1 Cath. Law. 199 (1955) 31

Quran 17:26 14

Segreti, Giulia,
Religious leaders in rare union with pledge to fight slavery, Financial Times (Dec. 3, 2014 10:18 AM) 16

Silos-Rooney, Jill,
The Civil Rights Movement, HBCUs, and You,
HBCU Lifestyle (Feb. 1, 2014) 16

Sippel, Julie Ann,
Comment, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional,
43 Cath. U.L. Rev. 1127 (1994) 31

St. John of the Cross, *Dichos* 64 13

Tobin, Gary A. & Weinberg, Aryeh K.,
Profiles of the American University: Religious Beliefs & Behavior of College Faculty (2007) 9

Trozzolo, Thomas A. and Brandenberger, Jay W.,
Religious Commitment and Prosocial Behavior: A Study of Undergraduates at the University of Notre Dame, 2 Center for Social Concerns 1 (2001) 11

Tuttle, Kathryn A.,
The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity,
4NS Christian Education J. 123 (2000) 12

Weiss Ozorak, Elizabeth,
Love of God and Neighbor: Religion and Volunteer Service Among College Students,
44 Rev. of Religious Research 285 (2003) 11

Wheaton College,
Community Covenant 10

Wyatt-Brown, Bertram,
American Abolitionism and Religion, Divining America: National Humanities Center 16

Yale, Slavery, and Abolition,
The Story of Yale Abolitionists..... 16

INTRODUCTION AND INTERESTS OF *AMICI*[1]

At first blush, this case may seem to be no more than a contest between the understandable desire of LGBT persons to be free from discrimination, and the understandable desire of some religious believers to avoid lending their skills to same-sex weddings. But the underlying First Amendment question—the sole focus of this brief—has nothing to do with same-sex marriage. Regardless of the facts here, that question is of paramount importance to *amici*, who (as described in Appendix) are religious colleges and organizations composed of such colleges, and who collectively educate more than 500,000 Americans annually.

That overarching question—the central question in this case—is whether a government may, consistent with the First Amendment, directly coerce a religious believer or institution to speak or act contrary to core religious beliefs, when the government has no compelling interest in forcing the person to do so. Relying upon a broad interpretation of this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 892 (1990), among others, the court below held that the First Amendment's Free Exercise Clause *allows* a government to coerce such violations of religious conscience, even without a case-specific compelling interest. The court likewise held that government-compelled speech, such as forced participation in a same-sex wedding, falls outside the ambit of the First Amendment's Free Speech Clause.

---

[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

If upheld by this Court—and regardless of the outcome of the specific dispute here—the rules employed by the court below and several others would be devastating to *amici* and other non-profit religious colleges and universities. For reasons of religious belief, religious colleges often embrace values in conflict with the prevailing values of the towns, cities and states in which they are located—not to mention those embraced by the various federal agencies charged with regulating those institutions. Those conflicts may turn not only on disagreements over sexuality, but also on such issues as the proper treatment of unlawful immigrants, the morality of military service, or even the proper way to express patriotism. As in this case, such clashes in values sometimes lead governments to impose their own values on religious colleges through law, regulation or enforcement action, and to ignore or override their First Amendment objections based on arguments similar to the arguments embraced by the lower court in this and several other recent, high-profile cases.

Accordingly, this Court's resolution of the First Amendment issues in this case is likely to have a profound effect on *amici*, their students, faculty, and supporters. *Amici* therefore urge the Court to reject the First Amendment analysis advanced by the court below, and to hold that all governmental attempts to coerce action or speech contrary to religious belief are subject to strict scrutiny.

STATEMENT

Petitioner's story shows clearly that he was coerced by the government to speak and act contrary to his religious conscience.

1. Jack Phillips owns Masterpiece Cakeshop (collectively "Phillips" or "petitioner"). As his brief explains in more detail, Masterpiece is heavily influenced by Phillips' Christian faith. Pet.Br. 8–9.

In 2012 Phillips was approached by respondents Craig and Mullins, who requested that he "design and create a cake to celebrate their same-sex wedding." Pet.App. 4a. Petitioner declined their request, offering them any baked goods other than the custom-designed cake. Pet.App. 4a.

2. Craig and Mullins filed charges against petitioner with respondent Colorado Civil Rights Division, alleging petitioner's actions were unlawful under the Colorado Anti-Discrimination Act (CADA). Pet.App. 5a–6a. After proceedings before an administrative law judge, who ruled against petitioner, he appealed to the Colorado Civil Rights Commission.

In adopting the ruling of the administrative law judge, the Commission acknowledged that the Colorado law was a "regulation of conduct," thus coercing petitioner to act. Pet.App. 81a. Applying the standard in *Smith*, the Commission concluded that, because this coercive law was (in the Commission's view) neutral and generally applicable, rational basis scrutiny applied. Pet.App. 82a. The Commission likewise concluded that the right of free speech provided no defense to the mandate to design and bake the cake.

As a result, the commission *ordered* petitioner to: (1) create custom wedding cakes celebrating same-sex marriages if he creates similar cakes for man-woman

marriages, (2) retrain his staff to do likewise, and (3) report to the Commission every order he declines for any reason for two years. Pet.App. 56a–58a.

3. On appeal, the Colorado Court of Appeals held that "conduct" of the sort ordered by the Commission, "even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections." Pet.App. 22a. In reaching this conclusion, the court held that "designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it." Pet.App. 30a.

The court thus applied rational basis scrutiny under both the Free Exercise and Free Speech clauses, and concluded that application of the Colorado law to Phillips met that lenient level of scrutiny. See generally Pet.App. 22a–45a.

SUMMARY OF ARGUMENT

1. The decision below—and others like it around the country—represents a serious, even existential threat to U.S. religious higher education. For if the First Amendment allows a government to coerce Mr. Phillips to act and speak in ways contrary to his religious beliefs, it is a small step to concluding that non-profit religious colleges have no First Amendment defense when the government coerces them to speak or act contrary to *their* beliefs or teachings. And if religious colleges could no longer speak and act in harmony with their religious missions, they would quickly lose the support of donors, parents, students and faculty.

The resulting weakening of religious higher education would be an enormous loss to the Nation. As Congress has recognized, religious colleges provide unique social benefits. Beyond academic excellence, these institutions offer students opportunities to learn in an atmosphere of greater philosophical and political diversity than that in many secular institutions; to enjoy greater physical and emotional safety; and to more fully integrate community service into their educations. See, *e.g.*, 154 Cong. Rec. H7658-03 (2008) (community service); 20 U.S.C. 1011a(a)(2) (diversity). Accordingly, the mere existence of religious colleges and universities enhances student choice by adding valuable diversity to higher education. See 20 U.S.C. 1011a(a)(2).

Unfortunately, a number of courts and governments have interpreted this Court's decisions in *Employment Division* v. *Smith* and other cases as a license to coerce religious individuals and institutions to act or speak contrary to their fundamental beliefs on a range of issues. Indeed, one district court recently re-

lied on such a view in rejecting a First Amendment defense by a Christian college to a pregnancy discrimination claim by a professor who violated the college's religion-based sexual conduct policy. And a major city recently passed an ordinance that would effectively invalidate all such policies. If the First Amendment does not protect a non-profit Christian college against that kind of incursion into its religious mission, it is hard to imagine circumstances in which such institutions would enjoy *any* meaningful First Amendment protection.

II. To prevent further harm to religious higher education and religious institutions generally, *amici* respectfully ask this Court to clarify either or both of two points. First, clarify that the First Amendment's Free Speech Clause requires strict scrutiny of governmental attempts to coerce speech—including speech like creating a custom cake or promulgating religion-based policies and practices. Second, clarify that governmental attempts to coerce action that violates religious beliefs or teachings are subject to strict scrutiny under the Free Exercise Clause, and that *Smith* simply does not apply in such situations.

Clarifying that strict scrutiny applies to such coercion will not, of course, resolve this case. And these *amici* take no take no position on the ultimate outcome of that analysis. Instead, *amici* simply urge the Court to establish as a general legal rule the principle—required by the First Amendment—that no government may directly coerce a violation of a person's religious beliefs without a compelling interest and narrowly tailored means.

ARGUMENT

I. Religious colleges and universities, which benefit American society in countless ways, would suffer serious harm under the misinterpretations of First Amendment doctrine illustrated by the decision below.

The Colorado Court of Appeals' narrow interpretation of *Smith* and other decisions of this Court—allowing a government agency to coerce Phillips to violate his sincere religious beliefs without satisfying strict scrutiny—would be devastating to religious colleges and universities. That in turn would be a tragedy for American society.

A. Religious colleges and universities bring unique benefits to higher education.

Religious colleges provide unique benefits to college students, and to American society more broadly. Besides their widely recognized academic excellence, and their extensive record of serving poor and minority communities, religious colleges offer students distinct benefits. Those often include a broader diversity of philosophical and political perspectives; greater physical safety; and better opportunities to naturally integrate community service into students' educations.

1. Religious colleges contribute substantially to diversity of thought in American higher education. This diversity—and its cousin, academic freedom—is essential for the kind of rigorous examination of ideas necessary to prepare leaders for careers in a nation of diverse political ideologies.

One illustration of how religious colleges contribute to that diversity is found in studies of professors' political affiliations and views. Overwhelmingly, most professors who teach in colleges and universities consider

themselves politically "liberal."[2] In a study of political donations by professors affiliated with some 446 colleges and universities, only thirteen were classified as having an average donation rating at or to the "right" of what the study deemed the political center.[3] And all but two of these thirteen more moderate schools—as measured by their professors' political views—have some religious affiliation. The study thus strongly suggests that religious colleges and universities tend to attract professors and students from a broader range of the political spectrum.

Even at more "progressive" religious schools,[4] religious affiliation adds an additional dimension to nominally secular political discourse. In non-religious schools, religious practice and belief are much less common on college faculties than among the general

---

[2] See, *e.g.*, James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Explanation of Three Hypothesis*, 39 Harv. J. L. Pub. Pol. 153, 154 nn 2 4 and accompanying text (2016) (documenting overwhelmingly liberal affiliation of professors in social science and law); Pascal-Emmanuel Gobry, *How academia's liberal bias is killing social science*, The Week (Dec. 17, 2014), http://theweek.com/article/index/273736/how-academiasliberal-bias-is-killing-social-science.

[3] Crowdpac.com, *How liberal or conservative is your university?*, https://www.crowdpac.com/games/lookup/universities. For a reference point, the scale utilized by the study suggests that all of the 295 cataloged Republican candidates for federal office are right of political center, and all but one of the 248 Democratic candidates are left of political center. *See* Crowdpac.com, *Candidates*, https://www.crowdpac.com/candidates.

[4] Brandeis University, which also boasts a long religious heritage, attracts professors whose donations are, on average, the 106th most liberal of the collection of 446 colleges. See Crowdpac.com, *Brandeis University*, https://www.crowdpac.com/games/lookup/universities?name=Brandeis%20University.

public.[5] It stands to reason that inclusion of religiously committed voices—a hallmark of religious colleges—adds needed diversity, even in communities with high-level political agreement.

Because of this diversity, religious colleges are more likely to give students greater exposure to the full range of political views, as well as a more complex appreciation of those views. That includes not only the more "conservative" views that are rare in many non-religious institutions, but also more "progressive" views leavened by religious perspectives.

The diversity that non-profit religious universities bring to higher education has another benefit: Given that universities control much of the nation's scientific and social science research, control of universities by one political group would tend to create a bias in favor of causes which that group happens to favor. Thus, as the Association of American Colleges has observed, "academic freedom is more likely to be upheld in a system of higher education with diversified control than in one under monolithic control."[6]

2. Religious colleges and universities also provide some of the nation's safest environments for learning and academic inquiry. For instance, in a recent study of campus safety, Regent University, Summit University, and Brigham Young University—all private, religious institutions—were named the safest in the

---

[5] See Gary A. Tobin & Aryeh K. Weinberg, II *Profiles of the American University: Religious Beliefs & Behavior of College Faculty* 1 (2007), http://www.jewishresearch.org/PDFs2/FacultyReligion07.

[6] Association of American Colleges, *A National Policy for Private Higher Education* 12 (1974), http://bit.ly/NatlPolicyPrivateEd.

nation.[7] Indeed, of the top twenty-five safest universities, eighteen (or 72 percent) are religious.[8] And on average, colleges classified as "most religious" consistently report much lower rates of sexual assault than the national average.[9]

Religious colleges believe their success in promoting student safety flows from their religious missions. Religious colleges often have strict codes of conduct for their students, phrased in explicitly religious terms. For example, Brigham Young University (reported as the safest college in America by *Business Insider*)[10] requires that its students "demonstrate in daily living on and off-campus those moral virtues encompassed in the gospel of Jesus Christ," including that they "[l]ive a chaste and virtuous life."[11] Other notably safe religious educational institutions likewise tie their standards of student conduct to their religious missions.[12]

---

[7] Tanya Loudenback, *The 25 safest college campuses in America*, Business Insider (Jan. 12, 2016), http://www.businessinsider.com/safest-college-campuses-in-america-2016-1.

[8] *Id.* For another permutation of the same rankings, *see* Niche, *2017 Safest College Campuses in America*, https://colleges.niche.com/rankings/safest-colleges/. The sources for these numbers include Department of Education data reported under the Clery Act, as well as students' self-reported perceptions of safety. *Id.* (under the link "[r]ead more on how this ranking was calculated").

[9] EDSmart, *College Sexual Assault Statistics of Top Ranked Schools 2015*, http://www.edsmart.org/college-sexual-assault-statistics-top-ranked-schools/#stats.

[10] Loudenback, *supra* note 7.

[11] See Brigham Young University, *Honor Code Statement*, https://policy.byu.edu/view/index.php?p=26.

[12] See, *e.g.*, Wheaton College, *Community Covenant*, http://www.wheaton.edu/About-Wheaton/Community-Covenant

Accordingly, for students and parents concerned about physical safety, religious colleges and universities offer a very attractive option.[13] And the mere existence of such options in the market for higher education helps ensure that other institutions place greater emphasis on student safety.

3. Students at non-profit religious colleges also tend to spend more of their time in community service than students at non-religious colleges, public or private.[14] For example, students at religious colleges frequently take time off from their educations for

---

("[W]hile the College is not a church, it is yet a community of Christians who seek to live according to biblical standards laid down by Jesus Christ for his body, the church.").

[13] Indeed, for these and other reasons, even though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, *e.g.*, Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sep. 2, 2012), http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html. (noting fondness of Muslim students for "the prevalence of ... single-sex dorms" and "a place where talk of religious beliefs and adherence to a religious code are accepted and even encouraged").

[14] See Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service Among College Students*, 44 Rev. of Religious Research 285, 289–291 (2003) (finding that college students who participate in religious activities were far more likely to engage in volunteer activity); Thomas A. Trozzolo & Jay W. Brandenberger, *Religious Commitment and Prosocial Behavior: A Study of Undergraduates at the University of Notre Dame*, 2 Center for Social Concerns 1, 3–4 (2001) (noting the positive correlation between religious university and prosocial behavior, including volunteer work).

domestic or overseas public service,[15] thanks in part to institutional policies and accommodations designed to encourage such service.[16] It is also common for students who don't serve in a traditional missionary capacity to volunteer in foreign countries while studying abroad.[17]

It is no accident that non-profit religious colleges tend to foster community service: Their emphasis on service is part and parcel of their religious missions.[18]

---

[15] George S. Wood, *Faith Development of Christian College Students Engaged in a One-Month Study Abroad Mission Trip*, Doctoral Dissertations of Ball State University (1999); Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4NS Christian Education J. 123 (2000) (Series 2); Adventures, *Passport: 1 to 3 Month College-Age Mission Trips*, https://www.adventures.org/trips/?prg=passport; Orphan Outreach, *Short-Term Mission Trips*, http://www.orphanoutreach.co/mission-trips/short-term-mission-trips.asp.

[16] See La Sierra University Student Missions, https://lasierra.edu/missions/; Office of Campus Ministries, Andrews University *Missions*, https://www.andrews.edu/cm/change/missions/about/; Brigham Young University, *Mission Deferments*, https://admissions.byu.edu/mission-deferments.

[17] See R. Michael Paige, Gerald W. Fry, Elizabeth M. Stallman, Jasmina Josic, and Jae-Eun Jon, *Study Aboard for Global Engagement: The Long Term Impact of Mobility Experiences*, 20 Intercultural Education 529 (2009); Global Volunteers, *International Student Volunteers*, https://globalvolunteers.org/students/; Megan Heise, *Tips for College Students Before, During, and After Volunteering Abroad*, Go Overseas (July 16, 2013), http://www.gooverseas.com/blog/tips-college-students-volunteer-abroad; Princeton Review, *The Gap Year Experience: A Life-Changing Opportunity*, http://www.princetonreview.com/study-abroad/college-abroad/ gap-year.

[18] See, *e.g.*, Pepperdine University, *Mission, Vision, and Affirmation Statement*, https://www.pepperdine.edu/about/our-story/mission-vision/ ("As a Christian University Pepperdine Affirms ...

They take seriously their faith's foundational religious texts, traditions and teachings—including those that urge adherents to take care of the foreigner, the poor and the needy.[19] Because of those religious teachings, religious colleges also embrace the challenging principle that the value of one's life is measured, not by what one achieves in a secular occupation, but by how well one serves others.[20]

Religious colleges thus operate in the hope that, for instance:

- a sociology major in a Jewish college might find inspiration in the Book of Exodus to study and

---

[t]hat knowledge calls ... for a life of service."); Baylor University, *Mission Statement*, http://www.baylor.edu/about/index.php?id=88781 ("Baylor seeks to fulfill its calling through excellence ... in service to the community, both local and global."), Luther College, *Mission Statement*, https://www.luther.edu/about/mission/ ("Luther is rooted in an understanding of grace and freedom that emboldens us in ... service to seek truth, examine our faith, and care for all God's people."); Liberty University, *Mission Statement*, http://www.liberty.edu/index.cfm?PID=32964 ("[A] community committed to Christ, Liberty emphasizes ... service to others."); Brandeis University, *Our Jewish Roots*, http://www.brandeis.edu /about/jewish-roots.html (noting Brandeis' "core... is animated by a set of values that are rooted in Jewish history and experience" including "the Jewish ideal of making the world a better place through one's actions and talents."),.

[19] See, *e.g.*, Deuteronomy 10:18–19 ("He executes justice for the fatherless and the widow, and loves the sojourner, giving him food and clothing. Love the sojourner, therefore; for you were sojourners in the land of Egypt.").

[20] See, *e.g.*, St. John of the Cross, *Dichos* 64 ("At the evening of life, we shall be judged on our love."), quoted in *Catechism of the Catholic Church*, art. 1022.

address the plight of refugees from war-torn lands;[21]

- a student in a Muslim school might be led by the Quran to investigate the factors influencing immigration, and then look for opportunities to serve local immigrants;[22] or
- a Catholic law student might be moved by the New Testament to provide *pro bono* assistance to unwed mothers or crisis pregnancy centers.[23]

Such moral values, originating in religious texts, contribute directly to the humanitarian work perpetuated by religious colleges.

Such service not only benefits those who are served and the students who serve them, it also reduces cultural divides among religions. That too benefits both students and the world community.

4. In these ways and many others, religious colleges make unique contributions to higher education, thereby enhancing student choice. Congress has recognized as much. As it said in the Higher Education Opportunity Act of 2008, P.L. 110-315, "[i]t is the sense of Congress that [] the diversity of institutions and educational missions is one of the key strengths of American higher education." 20 U.S.C. 1011a(a)(2).

---

[21] See, *e.g.*, Exodus 22:21 ("Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.").

[22] See, *e.g.*, Quran 17:26 ("Give ... to the needy and the wayfarers.").

[23] See, *e.g.*, Matthew 25:35–40 (Jesus's command to treat "the least of these" as if they were Jesus himself); James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world.").

Consistent with that view, Congress urged that "individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals." *Id.* And on that basis Congress directed that educational accrediting agencies "respect the ... religious missions" of colleges and universities. *Id.* § 1099b(a)(4)(A).

In short, just as this Court has recognized that racial diversity and other forms of diversity are valuable *in* an educational institution, see *Grutter* v. *Bollinger*, 539 U.S. 306, 343 (2003), Congress has recognized that diversity *among* educational institutions—including the diversity offered by religious colleges—is similarly invaluable.

5. As a hallmark of their diversity, educational institutions run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions as well as the societies in which those institutions operate. In many modern religious traditions, the call to faith is a challenge to think and live differently from the rest of society. From the Islamic command to "[b]e in the world as if you were a stranger or traveler,"[24] to Jesus' call to be a "leaven" in society,[25] to Isaiah's call—also echoed by Jesus—to be "a light unto the nations,"[26] people of faith are encouraged to transcend the cultures in which they live. And throughout the

---

[24] See Bonnie Louise Kuchler, *One Heart: Universal Wisdom from the World's Scriptures* 110 (2003) (citing a hadith that encourages to "[b]e in the world as if you were a stranger or traveler").

[25] See Matthew 13:33; Luke 13:20–21.

[26] See Isaiah 42:6; Matthew 5:14–15.

Nation's history, this effort to live differently has suffused numerous religious schools—compelling them, for example, to help lead the fight against slavery and racial discrimination.[27]

Modern religious colleges aspire to perpetuate that tradition of challenging the beliefs and practices of surrounding societies—in the words of Catholic Archbishop Charles J. Chaput, "being leaven in society" without "being digested by society[.]"[28]

---

[27] For example, Yale College, then a religious school, produced numerous prominent abolitionists. Yale, Slavery, and Abolition, *The Story of Yale Abolitionists*, http://www.yaleslavery.org/Abolitionists/abolit.html; see also Bertram Wyatt-Brown, *American Abolitionism and Religion*, Divining America: National Humanities Center (detailing the involvement of religion generally in the fight against slavery), http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/amabrel.htm. Later, most historically black colleges and universities were established by churches. Inspired by their religious beliefs, current and former students of these colleges played a critical role in the civil rights movement. *Id.*; see also Jill Silos-Rooney, *The Civil Rights Movement, HBCUs, and You*, HBCU Lifestyle (Feb. 1, 2014), http://hbculifestyle.com/hbcu-civil-rights-movement.

Today, religious schools continue to fight modern-day slavery in foreign lands. See, *e.g.*, Giulia Segreti, *Religious leaders in rare union with pledge to fight slavery*, Financial Times (Dec. 3, 2014 10:18 AM), http://www.ft.com/cms/s/0/438d5d48-7ac4-11e4-b630-00144feabdc0; Amy Harrison, *BYU students fight global issue of human trafficking*, The Daily Universe (Jan. 15, 2013), http://universe.byu.edu/2013/01/15/byu-students-fight-global-issue-of-human-trafficking1.

[28] Charles J. Chaput, *The Great Charter at 800: Why it Still Matters*, First Things (Jan. 23, 2015), https://www.firstthings.com/web-exclusives/2015/01/the-great-charter-at-800.

B. Like other recent misinterpretations of *Smith*, the decision below would allow governments to coerce religious colleges to act contrary to their religious beliefs.

Throughout our history, non-profit religious colleges have felt free to pursue religious paths that differ from the surrounding culture because of their assumption that they enjoy the full protection of the Free Exercise Clause and similar state constitutions and statutes. These are communities of likeminded people who share religious beliefs, including ideas about how those should be expressed in thought, word, and deed, and who teach those beliefs to the students who join their communities. But the decision of the Colorado Court of Appeals — and other similar recent cases[29] — rests on the view that, when persons and businesses decline to engage in certain kinds of discretionary activity for religious reasons, the government can compel them to perform, subject only to rational basis review.

1. It is not hard to appreciate the threat that view poses to religious colleges. Indeed, a district court recently relied on similar reasoning to reject a religious exercise defense raised by a non-profit religious college

---

[29] See, e.g., *State* v. *Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *pet. for cert. docketed*, Jul. 21, 2017; *Nat'l Inst. of Family & Life Advocates* v. *Harris*, 839 F.3d 823 (9th Cir. 2016), *pet. for cert. docketed*, Mar. 21, 2017; *Gifford* v. *McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); *Elane Photography LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013); *N. Coast Women's Care Med. Grp., Inc.* v. *San Diego Cty. Superior Court*, 189 P.3d 959 (Cal. 2008). Certain State legislative developments have comparable implications. See California A.B. 569 (2017), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB569 (declaring religious employers' conduct codes unenforceable "unless the employee is the functional equivalent of minister").

against a discrimination claim challenging its religion-based policy restricting sexual activity to marriage. See *Richardson* v. *Northwestern Christian Univ.*, ___ F. Supp. 3d ___, 2017 WL 1042465, at *12–*13 (D. Or. Mar. 16, 2017). And the city of St. Louis recently passed an ordinance that would invalidate almost all such policies.[30] Other religious schools have been forced to fund clubs that advocate positions contrary to the schools' religious beliefs. See, *e.g.*, *Gay Rights Coal. of Georgetown Univ. Law Ctr.* v. *Georgetown Univ.*, 536 A.2d 1, 68 (D.C. 1987). Religious colleges will likely be subject to more of the same kinds of coercion if the decision below stands as written.

Like individuals, non-profit religious colleges are obviously capable of exercising religion: Everyone agrees that "[t]he First Amendment's free exercise protections ... shelter ... nonprofit religion-based organizations." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., joined by Sotomayor, J., dissenting). Nonprofit religious colleges like *amici* thus exist at the undisputed core of the Free Exercise Clause's protections, not the periphery.

The threat to *amici's* free-exercise rights thus arises, not from any disagreement over whether they are protected by that Clause, but from lower courts' misinterpretations of *Smith*. That decision, of course, involved the denial of unemployment benefits to individuals who had been fired from their jobs because of ceremonial drug use, a violation of Oregon's criminal law. 494 U.S. at 874. And the Court sustained the denial of benefits on the ground that Oregon's criminal prohibition on drug use was a neutral law of general applicability, subject to rational basis review. But

---

[30] City of St. Louis Ordinance 70459 (2017).

Smith did not consider the much graver problem at issue here—that is, of private parties being *coerced* under state law to provide services or take other action in violation of their religious convictions.

2. For religious colleges, the Colorado Court of Appeals' conclusion that the government action at issue here is subject only to rational basis review under *Smith* raises the fearsome prospect of new legal vulnerabilities. As noted, because of their unique missions rooted in religious belief, religious colleges regularly engage in practices and enforce policies that secular colleges do not. These religion-based practices are often essential to the colleges' religious mission and purpose, but sometimes conflict with secular values that may be politically ascendant in a college's city or state, not to mention federal regulatory agencies and national accreditors.

Some religious colleges, for example, take steps to ensure the religious integrity of their student bodies, and thus enact rules not only about students' religious beliefs, but also about lifestyles and relationships. For example, many religious colleges have theologically based policies not only against same-sex marriages, but against nonmarital sexual relationships of all kinds.[31] As *Richardson* shows, the logic of the lower

---

[31] See, *e.g.*, Pepperdine University, *Student Code of Conduct* ("Engaging in or promoting conduct or lifestyles inconsistent with biblical teaching is not permitted."), https://www.pepperdine.edu/admission/student-life/policies/code-of-conduct.htm; Baylor University, *Policy on Sexual Conduct* ("Baylor will be guided by the biblical understanding that ... physical sexual intimacy is to be expressed in the context of marital fidelity."), http://www.baylor.edu/content/services/document.php?id=39247; Brigham Young University, *Church Educational System Honor Code* ("Homosexual behavior is inappropriate and violates the Honor Code."), https://policy.byu.edu/view/index.php?p=26&s=s1164;

court opinion could easily be extended to challenge many such policies on nondiscrimination grounds.

Many religious colleges also refuse, on religious grounds, to provide contraceptive services for their students—something this Court saw in *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016) (remanding claims brought by eleven different colleges). Although the Court there remanded for reconsideration of the colleges' claims under the Religious Freedom Restoration Act, those colleges and others remain vulnerable under state law if the Free Exercise Clause's protections are as limited as the court below and other state courts have held.

Governmental regulation of such policies would not only undermine academic freedom, it would also create multiple constitutional concerns. As former Brigham Young University president and Utah Supreme Court Justice Dallin H. Oaks has explained, governmental bodies "walk[] on eggs" when they create "rules that affect the internal operations of schools, colleges, and universities," especially religious colleges.[32] For it is those very institutions, among others, that tend to "develop and communicate the values that give force and meaning to *all* of the communications otherwise protected by the First Amendment."[33]

3. The Colorado Supreme Court's approach would also reduce the incentives of local, state and national

---

Wheaton College Community Covenant, *supra*, n.12 ("condemn[ing]," *inter alia*, "homosexual behavior and all other sexual relations outside the bounds of marriage between a man and woman").

[32] Dallin H. Oaks, *A Private University Looks at Government Regulation*, 4 J. Coll. & Univ. L. 1, 12 (1976) (emphasis added).

[33] *Id.*

legislatures to adopt and maintain appropriate exemptions for religious colleges. For example, conflicts over issues of sexuality in the context of alleged discrimination under federal law are generally avoided only because Congress provided that Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization[.]" 20 U.S.C. 1681(a)(3). The Solomon Amendment, which denies federal funding to colleges that deny access to military recruiters, likewise extends an exemption where "the institution of higher education ... has a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. 983(c)(2); see *Rumsfeld* v. *FAIR*, 547 U.S. 47, 55 (2006).

If the lower court's opinion in this case stands, however, legislatures may not consider it necessary to pass such exemptions in the future when proposed laws potentially conflict with the practices of religious schools. The result is certain to be, at a minimum, acrimonious litigation over religious exercise.

In short, *amici* have always understood their religion-based policies—including those that may seem counter-cultural in a given time or place—to be protected by the First Amendment. Although their policies are not directly proscribed by the Colorado Court of Appeals' decision, *amici* anticipate that, as in *Richardson,* such policies may be widely challenged under various other legal theories if that court's interpretation of *Smith* stands. If that happens, *amici* may soon face governmental coercion to support activity that their religious missions forbid, or to abandon activity that those missions require. *Amici* should not be put in that untenable position.

C. Like other recent misinterpretations of this Court's free speech precedents, the decision below would allow governments to coerce religious colleges to speak contrary to their religious beliefs.

Not only do the unique policies and practices of religious colleges constitute the exercise of religion, but they are also often a form of speech. Here again, the decision below and similar decisions elsewhere cast serious doubt on the availability of the First Amendment's Free Speech Clause to protect those practices.

1. Religious colleges take seriously their pedagogical obligation not just to convey knowledge, but to raise adults ready to fulfill their obligations as members of their respective religious traditions. Fulfilling that obligation requires *telling* students, before they apply and after they arrive, what is expected of them in their academic and personal lives. And that is why most religious colleges have written policies informing students of what is acceptable and unacceptable, and imposing consequences for breaches.

All such policies necessarily implicate free speech considerations. Accordingly, to prohibit a religious college from expressing its moral views by creating and articulating internal policies is, quite simply, to forbid speech. By the same token, to coerce a college into maintaining *different* policies more congenial to the government is tantamount to compelling speech. See, *e.g.*, *Agency for Int'l Development* v. *Alliance for Open Society*, 133 S. Ct. 2321 (2013).

2. Like other decisions involving wedding vendors, see, *e.g.*, *Arlene's Flowers*, 389 P.3d 543; *Elane Photography*, 309 P.3d 53, the decision below casts these conclusions into doubt—thereby raising the specter of a religious college being forced to amend or repeal core

elements of its conduct codes. Specifically, the Colorado Court of Appeals largely ignored the expression inherent in designing and creating a customized product for a particular event. The court instead speculated about the *reactions* of those who might view petitioner's final product: Forcing petitioners to create customized cakes would not, the court said, "convey a celebratory message about same-sex weddings likely to be understood by those who view it," and in any event, such a message is "more likely to be attributed to the customer than to Masterpiece." Pet.App. 30a.

Such reasoning would be very problematic if applied to religious colleges. By similar logic, a court could well conclude that no "message" would be conveyed by changes in a college's policies on, for example, sexual relationships or contraception, or that any such message would more likely be attributable to students or to the government. Pet.App. 30a–31a. That could spell the end of religious colleges' ability to express their moral perspectives through their policies.

It is no answer to say, as the Colorado court did, that an entity (in this case a business) remains free to *express* its own views even while complying with contrary direction from the government. Pet.App. 35a. From the perspective of a religious college, devoted to encouraging religious virtue in all aspects of life, the notion that a religious institution can follow one set of rules and preach another is not merely "a reflection of its desire to conduct business in accordance with [State] public accommodations law" — it is hypocrisy. Pet.App. 32a. And a legal regime that compels a religious college to be hypocritical in any of its core teachings is a regime that has lost sight of the First Amendment.

II. To avoid these harms to religious liberty, this Court should hold that the First Amendment does not permit governments to coerce violations of religious belief without satisfying strict scrutiny.

Fortunately, these conflicts between government mandates and religious liberty can be avoided through proper application of First Amendment principles. Both history and precedent demonstrate that the Amendment permits a government to coerce speech or action contrary to religious belief *only* when the specific government action satisfies strict scrutiny.

A. This Court's free speech decisions do not relieve a government of strict scrutiny when it coerces expression in violation of religious conscience.

The Colorado Court of Appeals did not deny that compelled speech is subject to strict scrutiny. Pet.App. 24a–25a; see also *Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012); *Wooley* v. *Maynard*, 430 U.S. 705, 713 (1977). But the court incorrectly adopted a crabbed understanding of what constitutes "speech," holding that petitioner's creation of a custom cake for a same-sex wedding is not speech at all.

1. Fine doctrinal distinctions are unnecessary in resolving the free speech issue presented here. Even assuming business policies like Phillips' are symbolic conduct rather than pure speech, there is no question that Phillips' policy involved "[a]n intent to convey a particularized message," or that "the likelihood [is] great that the message would be understood by those who [know about] it." *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence* v. *State of Washington*, 418

U.S. 405 (1974)). This alone requires giving the application of Colorado's law "the most exacting scrutiny." *Johnson*, 491 U.S. at 412.

Phillips' message is obvious: for religious reasons, he opposes same-sex marriage. By refusing to create custom cakes for a wedding, he conveys this message, not just to the respondents, but to the community. Indeed, that is the very basis on which vendors with such policies are typically *criticized*, in the press and elsewhere. Like the Christian college in *Richardson*, his message is that he will not facilitate that which he believes—rightly or wrongly—to be sinful.

It is equally obvious that assisting in a same-sex wedding conveys a different message than *declining* to do so. Weddings, as this Court pointed out in *Obergefell* v. *Hodges*, celebrate the concept of marriage, not just the union of two individuals. See 135 S.Ct. 2584, 2608 (2015). It follows that celebrating a particular same-sex wedding is in part a celebration of the *concept* of same-sex marriage—something with which Phillips, for his own religious reasons, disagrees.[34]

Moreover, because cutting a cake is one of the first acts that a married couple performs together, the provision of the cake necessarily facilitates their symbolic

---

[34] Various combinations of cake decorations can express even more specific approval of same-sex marriage. One need only look at the cake that the individual respondents ultimately used at their wedding—a "rainbow[-]themed [cake], symbolic of the gay pride movement"—to understand the symbolism of the wedding cake that respondents wanted Mr. Phillips to create. Pet.App. 140a; see also Pet.App. 184a; 216a.

speech in jointly cutting the cake, conduct that announces and celebrates their union.[35] Accordingly, it is not unreasonable for Phillips to believe that creating a custom cake for the individual respondents' wedding would have made him complicit in their expression of approval for the institution of same-sex marriage.

As this Court emphasized in *Obergefell*, people of good faith can disagree—and have a right to disagree—about the wisdom and propriety of same-sex marriage. See 135 S. Ct. at 2594. But the court below infringed this right by forcing Phillips, through the creation of a custom cake, to facilitate speech about same-sex marriage in a way that contradicts his own message about marriage. Such coercion is clearly subject to strict scrutiny under the First Amendment, as understood in decisions such as *Johnson*.

2. To avoid this conclusion—that Colorado is trying to force Phillips to convey an opposite message from the one he wishes to convey—the court below suggested that petitioner can "disassociate itself from its customers' viewpoints" by placing a sign stating that the cakeshop is merely complying with the law. Pet.App. 35a–36a. But this statement asks petitioner to "be a conscientious collaborator," just like religious schools were forced to be under the contraceptive mandate. See Oral Argument Transcript, *Zubik* v. *Burwell*, 136 S.Ct. 1557, No. 14-1418 (2014), at 90-91. As was explained in that case, "[t]here is no such thing." *Id.*

In addition, the lower court's proposed "fix" of disclaiming the offending message rather than refusing

---

[35] See The Knot, Everything You Need to Know About Cutting the Cake at Your Reception, https://www.theknot.com/content/cutting-the-cake (cutting the cake "symbolizes the couple's first joint task as newlyweds").

to participate in it runs counter to a long line of precedent. For example, a disclaimer option did not change the free speech analysis in *Hurley*, where the parade owners could have stated they were merely complying with the nondiscrimination law. *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 560-561 (1995). Nor did it do so in *Wooley*, where the objector could have added a bumper sticker saying he was required to use the offending license plate. 430 U.S. at 713. Nor did it do so in *Barnette*, where the Jehovah's Witnesses could have held up a sign disclaiming the message otherwise conveyed by their flag salute. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 639-642 (1943).

In short, there can be no doubt that the governmental decision here compels petitioner to speak, and to do so in a manner that violates his religious conscience. That is sufficient to require strict scrutiny.

B. Whether or not *Smith* was correct, it does not relieve a government of strict scrutiny when it coerces action in violation of religious conscience.

As to the Free Exercise Clause, the court below relied principally on *Smith*. While that decision remains controversial and subject to reconsideration,[36] the Court need not revisit it in this case. Rather, as the Court affirmed last term, even with *Smith* on the books, the Free Exercise Clause protects religious individuals and institutions against "indirect coercion or penalties on the free exercise of religion." *Trinity Lutheran Church of Columbia* v. *Comer*, 137 S. Ct. 2012,

---

[36] See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 566 (1997) (Breyer J., dissenting) (calling on the Court to "direct the parties to brief the question whether [*Smith*] was correctly decided, and set this case for reargument.").

2015 (2017) (quoting *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). Such coercion is amply present here, mandating the application of strict scrutiny.

1. Before *Smith*, this Court held that laws that coerce a person to use his body or resources in violation of his religious beliefs is subject to strict scrutiny. That was the rule applied to compulsory school attendance in *Wisconsin* v. *Yoder* 406 U.S. 205, 221 (1972). And that decision squarely recognized that coercing religious persons to perform acts that violate their religious conscience is a "not only severe, but inescapable" burden on free exercise. *Id.* at 218.

To be sure, *Smith* cut back on *Yoder* to the extent it suggested that strict scrutiny *always* applies even to non-coercive government action. See *Smith*, 494 U.S. at 883–890. But *Smith* did not overrule the core reasoning of *Yoder*, much less abrogate its holding. Moreover, as explained above, *Smith*'s holding dealt with a specific subset of religious burdens—those in which government *prohibits* (through its criminal laws) religiously motivated conduct. That holding did not extend generally to situations like that in *Yoder*, and here, in which the burden on religion is governmental *coercion* of action that violates the actor's conscience.[37]

Moreover, as this Court made clear just last Term, *Smith*'s holding was only that "the Free Exercise Clause did not entitle the church members to a special dispensation from the general *criminal* laws on ac-

---

[37] To be sure, dicta in *Smith* also endorsed prior decisions holding that governments can enforce tax and military conscription obligations even in the face of religious objections. *See* 494 U.S. at 880. But those are situations in which the obligation obviously *satisfies* strict scrutiny.

count of their religion." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017) (emphasis added). Because criminal laws generally cannot be used to coerce action, this statement confirms that *Smith*'s holding applies only to laws prohibiting conduct, not laws compelling conduct.

Properly understood, then, *Smith* does not affect *Yoder*'s core holding that, unless it satisfies strict scrutiny, government cannot coerce a person to engage in conduct that violates his religion.

2. Other decisions support the conclusion that strict scrutiny applies in any case where government coerces activity that violates a person's religious belief. For example, just five years ago, this Court in *Hosanna-Tabor* v. *EEOC* explained that the ministerial exception—which prevents government from coercing churches to select or retain ministers—is required by the Free Exercise Clause. 565 U.S. 171, 188 (2012). Indeed, this Court framed the ministerial exception as a means of avoiding coercion—*i.e.*, "*imposing* an unwanted minister" — in the very sentence explaining its holding that the exception is required by the Free Exercise Clause. *Id.* (emphasis added).

Smith did not limit this anti-coercion principle to the ministerial context. Indeed, two years after *Smith*, this Court in *Lee* v. *Weisman*, 505 U.S. 577 (1992), invoked both the Free Exercise and Establishment Clauses invalidate a school prayer practice that imposed on students "subtle coercive pressures." *Id.* at 588. The court there explained that *both* of "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.* at 589.

3. The prohibition against coercing acts contrary to religious belief articulated in *Trinity Lutheran*,

Yoder, *Hosanna-Tabor*, and *Lee* find their roots in the founding. As Professor McConnell has explained, the very purpose of the Establishment Clause was to prevent several coercive activities by government, including mandated attendance at worship services. See Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: The Establishment of Religion*, 44 Wm. & M. L. Rev. 2105, 2131–2132, 2144 (2003).

Another early example of hostility to any governmental coercion of action that violates religious conscience is the widespread colonial and post-revolution exemptions to military conscription. See *District of Columbia* v. *Heller*, 554 U.S. 570, 589–590 (2008) (discussing those laws in the context of the Second Amendment); *id.* at 661 (Stevens, J., dissenting) (same). During the founding generation, at least eight of the thirteen original state or colonial legislatures granted exemptions for Quakers and other conscientious objectors.[38]

---

[38] 1792 Conn. Pub. Acts 429 (Oct. 11, 1792), http://bit.ly/1792ConnPubActs429; Mass. Laws 1763, Ch. 294 (enactment date unknown), http://bit.ly/1763MassLaws294; *An Act for the more Speedy Levying One Thousand or at least Eight Hundred Men Inclusive of Officers to be Employd in his Majestys Service in the Current Year* in 32 George II. Original Acts, vol. 4, p. 55; Recorded Acts, vol. 2, p. 412 (March 9, 1759) (New Hampshire); Minutes of the Provincial Congress and the Council of Safety in State of New Jersey 82 (Oct. 28, 1775), *reprinted in* 4 *American Archives* 3: 1235; *An Act to Continue an Act Entitled An Act for Regulating the Militia of the Colony of New York with Some Additions thereto*, 1757 Laws of the Colony of New York 178 (enactment date unknown) [Ch. 1042]; 1770 Laws of North Carolina 787–788 (Dec. 5, 1770); *Militia Act* in 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders Comm'r. 1898) (Mar. 29, 1757); Conscience in America: A Documentary History of Conscientious Objection in America, 1757–1967 28 (Lillian Schlissel, ed. 1968)

Later, when James Madison was president, Maryland Quakers requested a pardon for defying a federal law attempting to coerce them into military service. Madison granted the pardon,[39] thereby demonstrating that he too opposed coercion in violation of religious conscience. No doubt for similar reasons, Congress has codified a "conscientious objector" exception to military service applicable to those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." 50 U.S.C. 3806(j).

Another example of the Nation's long-standing hostility toward governmental coercion of action in violation of religious conscience is the priest-penitent privilege now reflected in the evidence codes of all fifty states. That rule holds that courts cannot force a pastor to testify in court about a parishioner's confessions.[40] And it dates at least to the 1813 New York case of *People* v. *Phillips*,[41] which held that a priest could not be compelled to divulge the substance of a confession. The decision, moreover, was expressly grounded in free-exercise principles: "It is essential to

---

citing Rufus M. Jones, The Quakers in the American Colonies 179 (1962) (Rhode Island) (enactment date unknown).

[39] James Madison, Presidential Pardon, November 20, 1816, in The Gilder Lehrman Institute of American History, *Conscientious Objectors: Madison Pardons Quakers, 1816* at 4: https://www.gilderlehrman.org/sites/default/files/inline-pdfs/00043_FPS.pdf; *id.* at 7 (reproducing original document).

[40] *See* Julie Ann Sippel, *Comment, Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 Cath. U.L. Rev. 1127, 1128 n. 6 (1994) (cataloging state statutes).

[41] N.Y. Ct. Gen. Sess. (1813). This case was not officially reported, but an "editor's report" of the case is quoted in *Privileged Communications to Clergymen*, 1 Cath. Law 199 (1955).

the free exercise of a religion," the court held, that the Church "be allowed to do the sacrament of penance."[42]

Yet another illustrative practice involved the Fugitive Slave Act, which penalized those who obstructed the return of slaves to their masters or who even "obstruct[ed]" attempts to find a fugitive.[43] For religious objectors, the law thus coerced action and/or speech in violation of religious conscience.[44] Following Madison, two U.S. Presidents—James Buchanan and Abraham Lincoln—regularly pardoned people who violated the act, including those who violated it because of religious beliefs.[45]

4. If, contrary to principles dating to the founding, this Court were to extend *Smith* to hold that mere rational basis scrutiny applies to laws that coerce actions contrary to religious belief, the Free Exercise Clause would be isolated within the First Amendment. After all—as the court below implied—compelled speech receives strict scrutiny. Pet.App. 24a–25a; see also Section II.A, *supra*. Likewise, coercive violations of the Establishment or Free Press Clauses are categorically

---

[42] *Id.* at 207–208.

[43] Fugitive Slave Act, Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 § 7 (1850).

[44] *Id.* A failure to cooperate with attempts to coerce testimony as to the location of a fugitive is the classic definition of obstruction. See Black's Law Dictionary 1246 (10th Ed. 2014) (defining "obstruction of justice" to include "giving false information to or withholding evidence from a police officer or prosecutor.")

[45] Stephen Middleton, The Black Laws: Race and the Legal Process in Early Ohio 239–240 (2005) (pardon of Reverend George Gordon by Abraham Lincoln); Ruby West Jackson & William T. McDonald, Finding Freedom: The Untold Story of Joshua Glover, Runaway Slave 89 (2007) (pardon of Sherman Booth by James Buchanan).

prohibited or, at a minimum, subject to strict scrutiny. *See Lee*, 505 U.S. at 588 (Establishment Clause forbids subtle coercion); *Hosanna-Tabor*, 565 U.S. at 189; *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc.* v. *Tornillo*, 418 U.S. 241, 258 n.24 (1974) ("[Liberty] of the press is in peril as soon as the *government tries to compel* what is to go into a newspaper.") (quoting 2 Zechariah Chafee, Government and Mass Communications 633 (1947)) (modification in original) (emphasis added). The Free Exercise Clause must likewise generally prohibit coercion, as it must be "read in [its] context and with a view to [its] place in the overall [amendment]." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

To be sure, not every resistance to coercive laws will lead to socially desirable results, any more than every use of free speech. Free exercise claims, like free speech claims,[46] are brought by a wide range of individuals and groups. But this only shows the importance of the Free Exercise Clause: The same authority to coerce action that today afflicts Mr. Phillips could be used tomorrow to coerce those now in the majority into violating *their* consciences.

5. Finally, the court below attempted to compare petitioner's refusal to provide a wedding cake to a restaurant refusing to serve blacks on religious grounds. Pet.App. 44a—45a. But for two reasons, the analogy is inapt.

---

[46] Cf., *e.g.*, Complaint, *American Civil Liberties Union* v. *Washington Metropolitan Area Transit Authority*, No. 1:17-cv-01598, dkt. no. 1 (D. D.C. Aug. 9, 2017) (The ACLU, PETA, a pro-choice health care network, and the company of alt-right blogger Milo Yiannopoulos joined as plaintiffs to defend their mutual free speech rights).

First, unlike Southern restaurant owners who refused to serve blacks based on their racial status, it is undisputed that Phillips did not discriminate against the individual respondents based on their LGBT *status*. Instead, he declined to participate (directly or indirectly) in their same-sex wedding because, whether one agrees with him or not, for religious reasons he viewed that ceremony as reflecting a *moral* choice—a choice that, also for religious reasons, he could not support. See Pet.Br. 8–9.

Obergefell, moreover, went out of its way to emphasize that "reasonable and sincere people" can hold Phillips' view about the morality of same-sex marriage—and, by extension, the morality of participation in same-sex weddings. 135 S.Ct at 2594. That is, unlike denying service based on race, "reasonable and sincere people" can believe it would be sinful for them to be complicit in such a ceremony. By contrast, no "reasonable and sincere person" could believe it is okay to deny a generic good or service to someone simply because she is black.

Second, as *Obergefell* also explained, weddings represent the beginning of a marriage, the "highest ideal" of society. *Obergefell*, 135 S.Ct. at 2608. Accordingly, a person's decision whether to participate in a wedding has greater symbolic significance than her decision whether to serve generic food to a particular customer.

Whether or not these distinctions are ultimately sufficient for Phillips to prevail on the merits, either or both of these distinctions would amply justify *applying strict scrutiny* to coercion related to the provision of custom wedding services—and other specialized expressive services such as education—even if it were not applied to the provision of generic goods and services.

CONCLUSION

Without taking a position on the ultimate resolution of this case, *amici* urge the Court to hold that governmental measures that attempt to coerce speech or action in violation of religious beliefs or teachings must be subjected to strict scrutiny.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

September 7, 2017